A

ZAIFULL MUHAMMAD

v.

PP & ANOTHER APPEAL

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ABDULL HAMID EMBONG FCJ
ZAINUN ALI FCJ
SULONG MATJERAIE FCJ
C JEFFREY TAN FCJ
[CRIMINAL APPEALS NO: 05-197-2011 & 05-198-2011]
9 JANUARY 2013

D ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal against conviction and sentence - Discrepancies in weight of drugs - Original charge stated that gross weight of drugs was 880 grams - Weight of drugs in amended charge stated as 799.4 grams - Whether serious discrepancies existed as to weight of drugs - Whether reasonable doubt created as to identity of drug exhibit -* E *Whether discrepancies left unexplained by prosecution - Whether convictions safe*

F The amended charge proferred against the appellants stated that they had committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 799.4 grams of cannabis. The High Court judge found the appellants guilty of the offence and sentenced them to death. On appeal, the High Court's decision was affirmed by the Court of Appeal. Dissatisfied, the appellants appealed to this court. It was the appellants' G contention that the original charge as framed against them, when they were first charged in the Magistrate's court, stated that there were six "ketulan" of cannabis and the gross weight of the said drug was 880 grams. Hence, the argument was that the original charge was not consistent with the evidence of the prosecution H witnesses. On the other hand, the prosecution contended that since the amended charge was based on the net weight, therefore, any discrepancy in the gross weight was immaterial. The issue that arose for determination, *inter alia,* was whether there existed material discrepancies in the gross weight of the cannabis which created a doubt in the identity of the drug exhibit.

I

Held (allowing appeals; setting aside conviction and sentence)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) There existed material discrepancy in the number of "ketulan" mentioned in the original charge compared to the number of "ketulan" as testified by the prosecution witnesses. Any serious discrepancies on the gross weight and the number of "ketulan", unless satisfactorily explained, will go to the question of identity of the drug exhibit. Further, it was a contradiction in terms to say that there was no break in the chain of evidence when in fact there exists a material discrepancy as to the weight of the drug exhibit (*Yeong Kia Heng v. PP*; foll). (paras 32, 36 & 37)

(2) It was incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, it created a reasonable doubt as to the identity of the drug exhibit. In the circumstances, the defence should not have been called at the close of the prosecution case. As such, it would not be safe to uphold the appellants' convictions. (paras 35 & 37)

Bahasa Malaysia *Translation Of Headnotes*

Pertuduhan terpinda terhadap perayu-perayu menyatakan bahawa mereka telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 kerana mengedar 799.4 gram kanabis. Di Mahkamah Tinggi, perayu-perayu telah didapati bersalah bersalah dan dijatuhkan hukuman mati. Atas rayuan, Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi. Tidak puas hati, perayu-perayu merayu ke mahkamah ini. Adalah hujahan perayu-perayu bahawa pertuduhan asal yang dirangka apabila mereka dituduh untuk pertama kali di Mahkamah Majistret meyatakan bahawa terdapat enam ketulan kanabis dan berat kasar dadah tersebut adalah 880 gram. Oleh itu, adalah dihujahkan bahawa pertuduhan asal tidaklah konsisten dengan keterangan saksi-saksi pendakwaan. Sebaliknya, pihak pendakwaan menghujahkan bahawa memandangkan pertuduhan terpinda adalah berdasarkan berat bersih, maka, sebarang percanggahan dalam berat kasar adalah tidak material. Isu yang dibangkitkan untuk pertimbangan, antara lain, adalah sama ada wujudnya percanggahan material dalam berat kasar kanabis yang menyebabkan keraguan dalam identiti ekshibit dadah.

Diputuskan (membenarkan rayuan-rayuan; mengenepikan sabitan dan hukuman)

Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Terdapat percanggahan material dalam bilangan ketulan yang dinyatakan dalam pertuduhan asal berbanding dengan bilangan ketulan seperti dalam keterangan saksi-saksi pihak pendakwaan. Sebarang percanggahan serius terhadap berat kasar dan bilangan ketulan, kecuali jika dijelaskan secara memuaskan, akan membawa kepada persoalan identiti ekshibit dadah. Tambahan, adalah bercanggah dari segi terma untuk menyatakan bahawa tiada pemecahan dalam rantai keterangan apabila wujudnya percanggahan material berat ekshibit dadah.

(2) Adalah penting bagi pihak pendakwaan untuk memberi penjelasan bagi percanggahan tersebut. Tanpa penjelasan, ianya telah menyebabkan satu keraguan munasabah terhadap identiti ekshibit dadah. Dalam keadaan itu, pembelaan sepatutnya tidak dipanggil pada akhir kes pendakwaan. Oleh itu, adalah tidak selamat untuk mempertahankan sabitan perayu-perayu.

Case(s) referred to:

Loh Kah Loon v. PP [2011] 5 CLJ 345 FC ***(refd)***

Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***

Tan Yew Choy v. PP [2009] 4 CLJ 245 FC ***(foll)***

Yeong Kia Heng lwn. PP [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 FC ***(foll)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 40A(1), (2)

For the 1st appellant - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the 2nd appellant - Rosal Azimin Ahmad; M/s Shamsuddin & Co
For the prosecution - Mohamad Abazafree Mohd Abbas; DPP

Reported by Kumitha Abd Majid

JUDGMENT

Arifin Zakaria CJ:

Introduction

[1] These two appeals were heard together as they involved the same facts. The Court of Appeal had on 19 July 2011 dismissed the appeals by the appellants against their conviction and sentence imposed by the High Court.

The charge proffered against the appellants reads:

> Bahawa kamu bersama-sama, pada 8 Disember 2004, lebih kurang jam 7.45 petang di Jalan Emas, Taman Melawis, di dalam daerah Klang, di dalam Negeri Selangor Darul Ehsan, untuk mencapai niat bersama kamu, telah didapati memperedarkan dadah berbahaya iaitu seberat 799.4 gram Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 dibaca bersama-sama seksyen 34 Kanun Keseksaan.

The Facts

[2] The facts relevant to this appeal as narrated by the trial judge are briefly as follows: On 8 December 2004, at a food stall at Simpang Empat, Kampung Delik, Klang, Chief Inspector Loi Yew Lik ("PW4") was introduced to the second appellant by his informer. The informer left the scene immediately after the introduction. In that introduction, PW4 introduced himself to the second appellant as "Alex", a businessman running a pub in Sunway, Petaling Jaya. The second appellant introduced himself as "Osama".

[3] PW4 negotiated with the second appellant for the purchase of proscribed drugs from the second appellant. PW4 asked for 3kg of cannabis from the second appellant, but the second appellant refused to supply that amount as he was apprehensive about it, since he had never dealt with PW4 before. Instead, the second appellant offered only 1kg of cannabis to PW4. The second appellant told PW4 that the drug was of a high quality and fixed the price at RM2,700, which PW4 agreed. PW4 showed the money to the second appellant. However, the second appellant asked PW4 to meet him later at 7pm on the same day and place. The negotiation was conducted in Malay. Based on that negotiation, PW4 went back to his office at the Police

Headquarters in Shah Alam and briefed his men. They then, arranged for an ambush to be carried out during the forthcoming meeting between PW4 and the second appellant.

[4] At 6.30pm that evening, PW4 waited in his car at the agreed place. He was alone in the car. At 7pm, PW4 saw a car, a proton Iswara bearing registration No. BHC 4964 approaching his car and stopped about 15 meters from where he was waiting. Then, the second appellant came out from the front passenger door of that car and walked towards PW4's car. The second appellant asked PW4 to get into his car to take the drug, but PW4 refused. The second appellant then went back to his car. Two minutes later, the second appellant came out of his car and walked towards PW4's car. The second appellant got into PW4's car and told PW4 that his friend would fetch the drug while he and PW4 would wait there. PW4 agreed with that plan.

[5] Later, the second appellant asked PW4 to drive to Taman Melawis in Klang, where he said his friend would deliver the drug. PW4 agreed and drove to that place. Near the junction heading towards Taman Melawis, PW4 stopped his car. Five minutes later, PW4 saw the same Iswara car driven by a Malay man driving slowly past his car. The second appellant asked PW4 to follow the Iswara car, which he did.

[6] After a while, the Iswara car stopped by the roadside. PW4 stopped his car right behind the Iswara car. The second appellant then went out from PW4's car and got into the Iswara car. One minute later, the second appellant came out from the Iswara car and got into PW4's car. The second appellant told PW4 that his friend wanted the money to be paid first before PW4 could take delivery of the drug. PW4 did not agree to that and told the second appellant that he wanted to see the drug first. PW4 asked the second appellant to bring the drug to him. The second appellant then told PW4 that he had personally seen the drug inside the Iswara car. The second appellant went back to the Iswara car, to take the drug.

[7] When the second appellant got into the Iswara car, PW4 then gave the pre-arranged signal, that is by pressing on the brake lights of his car, to the police ambush party to act. Thereupon, the police ambush party descended on the Iswara car. A police Pajero vehicle blocked the path of the Iswara car. PW4 rushed out of his car and arrested the second appellant. Chief Inspector Mohd Husni bin Manaf ("PW5") arrested the driver of the Iswara car, who was later identified as the first appellant.

[8] PW4 then conducted a search inside the Iswara car. Underneath the front passenger seat of the car, PW4 found a white plastic bag with the words "Mobil Mart" printed on it. Inside that bag, PW4 found a slab of compressed cannabis ("satu ketulan mampat dadah ganja") wrapped in transparent plastic and aluminum foil.

[9] On the back seat, PW4 found a small black bag with the words "Bahagian Pembangunan Kesihatan Keluarga Kementerian Kesihatan". Inside that black bag, PW4 found a small package of cannabis ("satu mampatan kecil ganja") wrapped in yellow cellotape and yellow plastic. The first and second appellants, together with the packages seized, were all brought to IPD Klang.

[10] Before handing over the seized items to the investigating officer, Chief Inspector Ahmad bin Mohd Rambli ("PW8"), PW4 marked those items for identification, by signing his signature and writing the date '8 December 2004' coupled with other markings.

[11] The seized items were sent to the government chemist for analysis. The government chemist, PW2 confirmed that they were cannabis as defined in s. 2 of the DDA, having a net weight of 799.4g.

Proceedings In The High Court

[12] At the end of prosecution case, upon a maximum evaluation of the prosecution case, the learned trial judge held that a *prima facie* case had been established against both the appellants. The learned judge held that the "actual possession" and "actual knowledge" had been proven against them. As to the admissibility of PW4's evidence as an agent provocateur, the learned trial judge relied on s. 40A(1) and (2) of the DDA and the decision of the Federal Court in *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241.

[13] Accordingly, both appellants were ordered to enter upon their defence. Both appellants opted to give their evidence on oath.

The First Appellant's Defence

[14] The first appellant denied any knowledge of the drug found in the Iswara car. He said, the Iswara car belonged to his father. That night, he borrowed his father's car to pick up and send the second appellant to his workplace at the Marine Department Port

A Klang. On their way, the second appellant received a phone call and requested to be dropped off at Simpang Empat, Kampung Delik, Klang to meet a friend.

[15] After dropping off the second appellant, the first appellant
B received a phone call from a friend by the name of Madin. Madin wanted to see the first appellant in a restaurant at Melawis, Klang. He claimed, he met Madin at the restaurant. Madin borrowed the Iswara car for about 1/2 an hour, while he waited at the restaurant.

C **[16]** After Madin returned the car to him, he went off to pick up the second appellant, from where he had dropped off the second appellant earlier. But on his way, he was stopped by the second appellant who was inside PW4's car. He then stopped his car in front of PW4's car.
D

[17] Then, he saw the second appellant coming out from PW4's car and walked towards his car. The second appellant told him to wait for a while. Then, the second appellant went back to PW4's car. A short while later, the second appellant walked back to his
E car and got into the car.

[18] Once inside, the second appellant asked him to send him to his work place. When he was about to engage the car into the first gear, a Pajero jeep suddenly intercepted his path and blocked
F his car.

[19] A number of persons came out from the Pajero. They were all not wearing police uniform. The first appellant thought that they were robbers. The first and second appellants were pulled
G out of the car and were brought behind the car and made to sit on the road side. Then, one of the members of the raiding party, who identified himself as a police officer, told him he wanted to conduct a search. They could not see what was happening inside the car as they were sitting behind the car, facing the opposite
H direction. 20 minutes later, a Chinese gentleman approached the first appellant showing a package. He put that package on the roof of the car and asked the first appellant, what was in that package. The first appellant said he had no knowledge of the contents of the package. He then told the first appellant, "Ini
I barang salah …". The first appellant was shocked and scared. He asked the police, where was the package found. The police said, it was found inside the car.

[20] They were subsequently brought to Shah Alam Police Station. Later on, the first appellant was brought to his house and a search was conducted in his house, but nothing incriminating was found.

The Second Appellant's Defence

[21] The second appellant also denied any knowledge of the drug. He admitted he met PW4 on the morning and later at night on the day in question. However, at those meetings, they were merely chit-chatting about their common interest, ie, fishing while having teh tarik. He denied negotiating for the sale of any drug with PW4. He said, he was introduced to PW4 by his friend Sabri at a stall.

[22] And on the material date, initially, he took a ride in the first appellant's car to his workplace. But on the way, Sabri called him to go over to the stall.

[23] The first appellant dropped him off at the stall where he met Sabri and PW4. They chit chatted about fishing. Since the first appellant did not turn up to pick him up as promised, the second appellant asked PW4 to drive him to his workplace. On the way, the first appellant called and told him that he was at Taman Melawis. Then, he saw the first appellant's car overtaking their car and stopping in front of PW4's car. He then went over to the first appellant's car to thank him, but all of a sudden, a Pajero jeep blocked the first appellant's car and arrested them.

Decision Of The High Court

[24] At the close of the defence, the learned trial judge came to the conclusion that the appellants failed to raise any reasonable doubt on the prosecution's case and accordingly the learned trial judge held that the appellants were guilty of the offence as charged. They were sentenced to death.

Proceedings In The Court Of Appeal

[25] The appellants appealed to the Court of Appeal. The appeals were heard together. On 19 July 2011, the Court of Appeal unanimously dismissed both the appeals and affirmed the conviction and sentence imposed by the High Court.

A **Findings Of This Court**

[26] Learned counsel for the first appellant raised two grounds of appeal while learned counsel for the second appellant raised four grounds of appeal. We will first consider the common ground of
B appeal that there are serious doubts as to the identity of the drug exhibit.

[27] Learned counsel for the appellants submitted that in the present case, the original charge before the magistrate reads as follows:
C

> Bahawa kamu bersama-sama pada 08/12/2004 jam lebih kurang 7.45 petang, di tepi Jalan Emas, Taman Melawis, di dalam Daerah Klang, di dalam Negeri Selangor bukan seorang yang diberi Kuasa di bawah Akta Dadah Berbahaya 1952 atau mana-
D mana Peraturan di bawah Akta tersebut telah didapati di dalam jagaan dan kawalan kamu **[6] ketulan mampatan daun kering yang disyaki Ganja 880 gram [berat kasar],** oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 39B (1) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta yang sama (Pindaan 1986). (emphasis added)

E

The material particulars stated in the said charge were – (i) there were six "ketulan" of cannabis; and (ii) the gross weight of the cannabis is 880g. Learned counsel contended that they were not consistent with the evidence of the witnesses for the prosecution.
F

[28] The material evidence on these issues are that of PW4, PW8 and PW2. PW4 testified that he found a white plastic bag with the words 'Mobil Mart' printed on it. On examination, he found that the said bag contained "satu ketulan mampat dadah
G ganja yang berbalut plastik lutsinar dan kertas timah". PW4 also testified that he found on the backseat, a small black bag with the markings "Bahagian Pembangunan Kesihatan Keluarga Kementerian Kesihatan". On examination, he found it to contain "satu mampatan kecil ganja yang berbalut sellotape berwarna
H kuning dan plastik warna kuning, di dalam beg itu". PW4 then handed over the exhibits to PW8.

[29] PW8 in his testimony stated that he received two "ketulan" from PW4 which he later marked them as "AA1" and "AB2". Upon weighing, he found that the gross weight of "AA1" was
I 800g and that of "AB2" was 80g thus, the total weight was 880g. He further stated that after examining and marking the exhibits, he then kept them in the steel cabinet under lock and key. On 7 February 2005, he sent the exhibits to PW2.

[30] PW2 testified that he had received two "ketulan" from PW8. He then analysed the drug exhibit and confirmed that they were cannabis having a gross weight of 829.49g. The net weight of the cannabis was 799.4g. PW4, PW8 and PW2 consistently spoke of only two "ketulan" of cannabis and no one ever mentioned six "ketulan" as stated in the original charge. As for the gross weight of the cannabis, PW8 stated that the gross weight was 880g. However, PW2 testified that the gross weight was 829.49g.

[31] In response, the learned Deputy Public Prosecutor submitted that the charged referred to by the learned counsel was the original charge framed against the appellants when they were first charged in the lower court. The charge was later amended to read as trafficking in 799.4g of cannabis. On that premise, he contended that the discrepancies are not material to the prosecution's case.

[32] We are of the view that in present case, there exist material discrepancies in the gross weight of the cannabis mentioned in the original charge compared to the evidence of PW2. Other than that, there also exist material discrepancy in the number of "ketulan" mentioned in the original charge compared to the number of "ketulan" as testified by PW4, PW8 and PW2. The gross weight and the number of "ketulan" of the drug exhibit certainly go to the identity of the drug exhibit. How else can the identity of the drug exhibit be established. Therefore, any serious discrepancies on the gross weight and the number of "ketulan", unless satisfactorily explained, in our view will go the question of identity of the drug exhibit.

[33] In the present case, there are two material discrepancies that is as to the number of "ketulan" and as to the gross weight of the cannabis. Both these discrepancies were never explained by the prosecution, save to say that the charged referred to by the learned counsel was the original charge, and the charge was later amended to read as trafficking in 799.4g of cannabis. It was further contended by the prosecution that since the amended charge is based on the net weight, therefore, any discrepancy in the gross weight is immaterial.

[34] The prosecution further argued that based on the evidence before the court, there is no break in the chain of the evidence with regard to the drug exhibit. The prosecution submitted that all the relevant witnesses called by the prosecution had positively

identified the drug exhibit based on the contemporaneous markings made by the witnesses. On that premise, the prosecution contended that the discrepancies do not create any doubt in the identity of the drug exhibit.

[35] With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. In the circumstance, the defence should not have been called at the close of the prosecution case.

[36] In *Yeong Kia Heng lwn. PP* [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372, like in the present case, there was a discrepancy in the weight of the drug exhibit between the police and the chemist. The former Supreme Court held that the difference in weight had cast a reasonable doubt on the identity of the drug exhibit. On that premise, the Supreme Court held that the appellant ought not to have been called to enter his defence. Similarly in *Tan Yew Choy v. PP* [2009] 4 CLJ 245, the Federal Court again found that because of the discrepancy in weight of drug exhibit as found by the police as against the chemist, the Federal Court held that that gave rise to a serious doubt on the identity of the drug exhibit and allowed the appeal by the accused. Zulkefli Makinudin FCJ, in delivering judgment of the court had this to say:

> We agree with the contention of the appellant that there is a serious doubt as to the weight of the cannabis, thus affecting the identity of the cannabis. According to the chemist (PW3) the total weight of the cannabis is 224.65 grams. The weight of 224.65 grams is obtained by adding the weight of the cannabis placed on the newspaper which is 151.08 grams and the cannabis from the 40 plastic packets which is 73.57 grams. However, exh. P15 (Borang Serah Menyerah) stated that the weight of the cannabis to be 140 grams (on the newspaper) and 65 grams (in the 40 packets) making the total gross weight to be 205 grams. This would mean that by the time the cannabis reached the hands of the chemist the cannabis has increased in weight by 19.65 grams.

[37] Our attention was drawn to the case of *Loh Kah Loon v. PP* [2011] 5 CLJ 345 where the Federal Court held that even though there existed a discrepancy in the weight of the drug exhibit as found by the police and the chemist, the High Court found as a fact that there was no doubt in the identity of the exhibit because the evidence before the court showed that there

was no break in the chain of evidence. Having considered these three previous decisions, we agree with the reasoning in *Yeong Kia Heng lwn. PP (supra)* and *Tan Yew Choy v. PP (supra)*. In our view, it is a contradiction in terms, to say that there is no break in the chain of evidence, when in fact there exists material discrepancy as to the weight of the drug exhibit. In any event, in the present case the discrepancies are not only as regard to the gross weight but also as to the number of "ketulan". In our view, these are material discrepancies that go to the issue of identity of the drug exhibit. In the circumstances, therefore, it cannot be said that there is no break in the chain of evidence. On that premise, we hold that it would not be safe to uphold the convictions.

Conclusion

[38] In the upshot, the appeals are allowed and the conviction and sentence imposed by the High Court, which were affirmed by the Court of Appeal, are set aside. The appellants are acquitted and discharged.